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ALEXANDER L. STEVAS,
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No. 82-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Is a reapportionment plan which creates legislative districts conceded to be (1) substantially equal in population and (2) in no way racially discriminatory, invidiously discriminatory because it minimizes election contests among incumbents in some legislative districts?

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MOTION TO DISMISS OR AFFIRM

The State, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the question presented is too insubstantial to merit further argument.

OPINIONS BELOW

The unreported Per Curiam Order of the Court of Appeals of Maryland dated June 4, 1982, and the unreported Report of the Special Master appointed by the Court of Appeals of Maryland dated May 12, 1982, is printed in the Appendix of Wiser's jurisdictional statement at A-1 to A-4 and A-5 to A-48, respectively. As this is an original proceeding in the Court of Appeals of Maryland, there are no further opinions or orders.

JURSIDICTION

Wiser erroneously asserts that the jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). It is the position of the State that jurisdiction only arises pursuant to 28 U.S.C. §1257(3) and that review is by way of certiorari. Therefore, the State requests this Court to treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103 and to treat this Motion as a Brief in Opposition.

LAW INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed in Appendix A of this Motion. Sections 1 through 5 of Article III of the Maryland Constitution are printed in Appendix A of this Motion. The portions of the Legislative District Plan for the State of Maryland directly at issue here are printed in the Appendix of Wiser's Jurisdictional Statement at A-49 to A-74.

STATEMENT OF THE CASE

Under the terms of Article III, Section 1 of the Constitution of Maryland, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryand. The upper house, or Senate, has a membership of forty-seven; the lower house, or House of Delegates, has one hundred forty-one members. Md. Const., Art. III, Sec. 2. Section 3 of Article III provides that the State shall be divided into forty-seven legislative districts, with one Senator and three Delegates elected from each district.

The current legislative districting plan traces its origins to the plan proposed by the Governor's Advisory Committee on Reapportionment. The Committee was charged with receiving public comment in order to better formulate a State legislative reapportionment plan and a congressional redistricting plan for the Governor.

The Advisory Committee held numerous public hearings between May 17, 1981 and December 8, 1981 in formulating its redistricting recommendations; 213 persons testified at these hearings. On December 8, 1981, the Committee made its recommendations to the Governor, who subsequently held two public hearings: one on December 21, 1981, at which 24 witnesses spoke, and one on December 23, 1981, at which 46 witnesses testified. After considering the testimony, the Governor adopted the majority of the Committee's recommendations. J.S. App. at 5-8.

On the first day of the 1982 Session of the General Assembly, pursuant to Article III, Section 5 of the Maryland Constitution, the Governor's Plan was introduced as House Joint Resolution 15 and Senate Joint Resolution 10. A slightly modified version of this

Plan, including technical corrections, was introduced as House Joint Resolution 32. Lengthy hearings were held before the Senate Constitutional and Public Law Committee and the House Constitutional and Administrative Law Committee. After the General Assembly approved House Joint Resolution 32 (hereinafter the Legislative Plan) on February 26, 1982, it became law in accordance with Article III, Section 5 of the Constitution of Maryland.

Responding to original proceedings instituted by Wiser and other registered voters, pursuant to Section 5 of Article III of the Constitution of Maryland, the Maryland Court of Appeals directed that hearings be conducted by a retired judge of the Court of Special Appeals, sitting as a special master.

Wiser alleged that Legislative Districts 14A and 15 through 20 violated the Maryland constitutional requirement that districts be compact and give due regard to natural boundaries and the boundaries of political subdivisions. It was secondarily asserted that consideration of incumbency interests constituted political gerrymandering in viol-

ation of the Fourteenth Amendment.[1] To cure these alleged defects, Wiser proposed a plan which would have altered the configurations of every district within Montgomery County. J.S. App. at 33-39.

The Special Master held an evidentiary hearing on April 14, 1982, and heard oral argument on April 28, 1982. On May 12, 1982, the Special Master issued his report and findings, rejecting, inter alia, Wiser's challenge and suggested plan. Subsequently, on June 1, 1982, the Court of Appeals of Maryland heard oral argument in support of or in opposition to the Report submitted by the Special Master. These proceedings before the Court of Appeals culminated in the per curiam order of June 4, 1922, which rejected all challenges to the Legislative Plan.

The primary election of September 14, 1982 was conducted in accordance with the per curiam order of June 4, 1982 and the Legislative Plan as adopted by the General Assembly of Maryland.

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[1] The federal claim was not extensively briefed or argued before the Special Master or the Court of Appeals. It occupied merely one of 15 paragraphs of the Petition and only approximately six of the 87 pages of various memoranda filed by Wiser.

ARGUMENT

A Legislative Reapportionment Plan Which Creates Legislative Districts Which Are Admitted To Be Both Substantially Equal In Population And In No Way Racially Discriminatory Is Not Unconstitutional Simply Because It Also Minimizes Election Contests Among Incumbents In Some Legislative Districts.

It should be noted at the outset that review of this case is appropriate only by means of writ of certiorari pursuant to 28 U.S.C. §1257(3), rather than by appeal pursuant to 28 U.S.C. §1257(2). Appellant Wiser has not, as will be demonstrated within, met the minimal threshold necessary to establish a right to appeal, because he has failed to identify a specific religious, ethnic, economic or political group which has been disenfranchised by the Legislative Plan. Absent such an identifiable group, there is no basis for a claim of invidious discrimination under the Equal Protection clause of the Fourteenth Amendment, and thus no denial of a federal right. Moreover, Appellant has challenged the constitutionality of one small portion of the Legislative Plan only, and thus a finding of a federal constitutional violation in that portion would not result in invalidation of the Plan in its entirety.

Despite Wiser's claim that the districting in question is violative of his right to equal protection of the law, he concedes, as he must, that the Legislative Plan affords each district substantial equality of population and is in no way racially discriminatory. He mistakenly urges an ethereal constitutional claim, that minimization of election contests among present incumbents represents invidious discrimination.[2] However,

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[2] Wiser also bases an equal protection claim on his theory that residents of the "northern" portion of Montgomery County are somehow disenfranchised because most of the incumbent legislators live in the "southern" part of the county. However, he has produced no evidence that the configurations of the legislative districts in Montgomery County were the result of discriminatory intent or that such configurations have any discriminatory effect. J.S. App. at 35 and 37; Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). Past failure at the polls, let alone speculative future failure, does not establish discriminatory effect, much less discriminatory purpose. City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion); White v. Regester, 412 U.S. 755, 765 (1973). Moreover, it is well settled that an interest or other group has no constitutional "entitlement" to elect representatives in proportion to its population. City of Mobile v. Bolden, supra. See also, Whitcomb v. Chavis, 403 U.S. 124, 156-157 (1971) (Where this Court warned that a contrary approach "would spawn endless litigation.") In addition, it is questionable whether Wiser has raised a justiciable claim. Wendler v. Stone, 350 F.Supp. 838, 840 (S.D. Fla. 1972); see also, Whitcomb v. Chavis, supra, 403 U.S. at 156. Finally, notwithstanding the particular locality of a legislator's residence, in fact the legislators of each district are elected at large, represent and are responsible to the entire district and all of its residents. To conclude that a Delegate or Senator is concerned only with the interests of (cont.)

he recognizes that this Court has never found the drawing of district lines so as to minimize incumbency battles to be a violation of the equal protection clause. J.S. App. at 13.

Upon compliance with express constitutional criteria, districting that minimizes contests among incumbents or maintains the relationship between representatives and their constituencies is not political gerrymandering. Indeed, such considerations have been judicially approved given the intrinsically political nature of reapportionment as a legislative process. White v. Weiser, 412 U.S. 783, 791 (1973). Thus, an otherwise acceptable plan which takes into account political factors is not constitutionally infirm. As noted by this Court in Burns v. Richardson, 384 U.S. 73, 89, n.16 (1966), a case involving state legislative apportionment:

> "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."

In White v. Weiser, a case concerning congressional reapportionment, this Court

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the citizens in that area where he or she resides is to ignore political reality.

reiterated this philosophy. Upholding the lower court's invalidation of a legislative plan with unacceptable population variances, this Court stated that the variances were not necessary to achieve the asserted state goal of promoting "constituency - representative relations." This Court acknowledged the policy to be one "frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." Id. at 791. The Court endorsed the policy, stating "We do not disparage this interest," and quoted Burns v. Richardson, supra. Id. at 791, 797. Also significant in White v. Weiser is this Court's invalidation of the lower court's order implementing a districting plan which ignored the State's policy and used, instead, population considerations as the sole criterion. Id. at 797.

This Court has consistently recognized the political nature of redistricting, which explains its approval of the inclusion of political criteria in the reapportionment process.

> "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. . . . Here those decisions were made

> by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts." White v. Weiser, supra, 412 U.S. at 796.

See also Gaffney v. Cummings, 412 U.S. 735, 753-754 (1973) ("[t]he reality is that districting inevitably has and is intended to have substantial political consequences."); Upham v. Seamon, _____ U.S. _____, 102 S.Ct. 1518 (1982).

No evidence in the record supports Wiser's contention. J.S. App. at 37. Rather, the record reflects numerous rational state policies and reasonable state interests which justify and explain the configurations of the Montgomery County Districts. Indeed, the Legislative Plan was considered and approved by the Advisory Committee, the Governor and the General Assembly after numerous public hearings. The Montgomery County Delegation was involved in the process of developing the districts for the county (as were other delegations in other counties).[3]

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[3] Appellant alleges that the involvement of the Montgomery County legislative delegation in developing prospective districts for the County is somehow improper. However, it should be remembered that districting is a political-legislative function. The Governor's consideration of the (cont.)

The Montgomery County legislative districts were built upon the external boundaries of Montgomery County (the boundary of the District of Columbia, the Potomac River and the Prince George's County line) and the lines of existing legislative districts. These are rational and permissive starting points. See, e.g., Wells v. White, 623 S.W.2d 187, 189 (Ark. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 1753 (1982); Cosner v. Dalton, 522 F.Supp. 350, 361 (E.D. Va. 1981). Furthermore, it is clear from the evidence in the record that constitutionally mandatory consideration was given to various natural boundaries and political subdivisions, to the accommodation of many communities of interest, and to the historic pattern of a shared district with Howard County. Inevitably, practical considerations of topography, means of transportation and

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suggestions of local legislators in drafting a plan may well be advisable since the Legislature has the right to devise its own plan if it is dissatisfied with that of the Governor. Md. Const. Art. III, Sec. 5. The process of creating a legislative plan cannot be accomplished in a vacuum — the knowledge and experience of the elected representatives from the various diverse areas of the State is vitally important. Reapportionment is uniquely a political process, for who is better qualified to speak for the needs and desires of the citizens than their representatives elected to the body with ultimate responsibility for devising the plan? Certainly, a self-appointed spokesman — an individual representing no one but himself — is not in a superior position.

lines of communication were taken into account.

In sum, it is clear that the protection of incumbents in drawing district lines is a justifiable and permissible legislative concern.[4] The Legislative Plan is not made constitutionally vulnerable by the consideration of political factors. Although problems may arise from the use of political criteria when significant population deviations are created or when the voting strength of racial, ethnic, or political groups is minimized, no such infirmities exist in the State's plan.

CONCLUSION

Accordingly, the State respectfully submits that the question upon which this cause

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[4] Indeed, as the Special Master noted, "a serious question exists whether [a] challenge to a legislative districting plan upon the mere ground that it tends to minimize contests among present incumbents is justiciable." J.S. App. at 35-36. Thus, in WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (S.D. N.Y. 1965), aff'd per curiam, 382 U.S. 4 (1966), this Court upheld a lower court decision that political gerrymandering may not be subject to constitutional attack. And in Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1972), this Court refused to review a U.S. Court of Appeals decision holding non-justiciable a complaint of political gerrymandering. According to these authorities, Wiser has no cause of action under the Fourteenth Amendment.

depends is so unsubstantial as not to need further argument, and respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX A

Pertinent Constitutional Provisions

Constitution of the United States

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland

Article III.

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Delegates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into legislative Districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-menber delegate district and one (1) multimember delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and the Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennnial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after

the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.